FRONT Report LINE

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High tech training popular with officers

THE AG'S HIGH TECHNOLOGY and Computer Crime Unit's regional two-day training programs have been a success with law enforcement officers. Five of eight programs already have been held in cooperation with the Missouri Deputy Sheriffs' Association.

"We have received an overwhelming positive response from officers who have attended these sessions, and several requests for additional programs," said unit director and assistant attorney general Dale Youngs.

He said similar training programs will continue to be a major part of the unit's work. "One of our missions is to provide training to law enforcement and other agencies investigating technological crimes. As long as there is a need for this type of assistance, we intend to provide it."

The 12-hour, POST-certified training programs introduce law

SEE HIGH TECH, Page 6

COLLECTING EVIDENCE: Chris Byrd, left, and Doug Blaha open a CD drive during a hands-on class in Jefferson City. The reserve deputy sheriffs for the Cole County Sheriff's Department were learning how to collect electronic evidence.

TRAINING PROGRAMS

- **Clinton**, Oct. 10-11
- **Dexter**, Oct. 23-24
- **Edina**, Nov. 13-14

Officers are encouraged to register early — class sizes are limited. Call MDSA at 573-634-2270 or log on to the AG's Web site, www.moago.org.

Cost of the POST-certified hours is $24 for MDSA members and $84 for others.

DEPARTMENT TRAINING

If your law enforcement agency would like to schedule training, contact High Tech Unit director Dale Youngs at 816-889-5000.

Federal court limits federal suits for police pursuits

AN 8th U.S. CIRCUIT COURT of Appeals ruling limits the ability of plaintiffs to file federal suits against police officers who engage in high speed pursuits. The ruling, which reverses a 2000 decision, *Feist v. Simonson*, 222 F.3d 455 (8th Cir. 2000), said injuries that may arise from a police pursuit do not normally give rise to a constitutional violation.

Historically, plaintiffs have had to prove that their injuries were the result of a pursuing officer violating some standard of care and that the injuries were directly related to the officer's negligence. Often, the injuries were caused by the pursued suspect, not the officer. Under established Missouri law, the liability lies with the fleeing suspect.

SEE PURSUITS, Page 2

Search of backpack unconstitutional

In *State v. Solt*, 48 S.W.3d 677 (Mo.App., S.D. 2001), the Missouri Court of Appeals upheld the suppression of drugs found in the backpack of a Greyhound bus passenger. The suppression did not occur because the search was illegal, but because the officers had no cause to seize the suspect before searching.

Police officers entered a bus stopped at a bus station in Springfield to look for narcotics couriers. They found the defendant asleep with the backpack between his knees.

The defendant answered questions and denied the backpack was his. The officers told the defendant to exit the bus and advised him of his *Miranda* rights. The officer then stated he was going to look through the backpack "unless defendant told them he could not." Marijuana was found.

The trial court suppressed the evidence and the state appealed. The appellate court held that the search was illegal because the officers had neither probable cause to arrest nor reasonable suspicion to detain the defendant. The officer admitted he intended to "detain" the suspect, but had insufficient facts to justify such a detention.

Also, given the officer's admission, the state could not claim this was a consensual encounter. While initially the encounter was voluntary and consensual, the subsequent show of authority conveyed "the message that compliance with their requests [was] required."

Had the officers left the suspect alone and removed the backpack as abandoned property, the search of the bag may have been permitted. But the court was unwilling to separate the search from the illegal seizure. Had a search of the backpack occurred based on the "abandoned property exception," the officers then may have had probable cause to arrest the defendant based on the properly seized evidence.

PURSUITS: CONTINUED FROM PAGE 1

For many years, innovative plaintiffs' attorneys have attempted to argue that officers who engage in pursuits that result in injuries are guilty of constitutional violations. These arguments have been unsuccessful. In 1998, the U.S. Supreme Court held that a pursuit could be a "substantive due process" violation if the officer engages in conduct that "shocks the conscience." *Sacramento v. Lewis*, 523 U.S. 833, 835 (1998). Mere negligence by an officer does not create liability in federal court.

While the Supreme Court seemed to suggest that constitutional claims exist only if the officer purposely acted to cause harm, last year the 8th Circuit seemed to disregard that standard and greatly expanded the liability of officers in high-speed pursuits.

In *Feist*, an officer pursued a suspect down a one-way street the wrong way. Ignoring the "intent-to-harm" standard set forth by the Supreme Court, the 8th Circuit held that because the officer had time to think about his decision to follow the suspect this was "deliberate indifference" that created liability.

In essence, the 8th Circuit made mere negligence in pursuits subject to a constitutional claim. As reported in Front Line, that decision greatly expanded police liability for pursuits.

Fortunately, the 8th Circuit has reversed the *Feist* decision. In *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001), a Minnesota city police officer detected a suspect driving 111 mph. After a six-minute pursuit, the suspect ran a red light and hit a pickup truck driven by the plaintiff. The plaintiff sued the officer and his department, claiming the pursuit and resulting crash was a substantive due process violation under the Constitution.

The court held that the officers "who risked their lives to remove this menace from the public highways were not guilty of a conscience-shocking intent to harm." The court correctly pointed out that the officer's intent was not to harm anyone, but to stop the suspect.

Again, this decision is consistent with the Supreme Court's 1998 decision and properly limits constitutional claims against officers who engage in pursuits to those situations where the officer's actions shock the conscience. While restrictions on police pursuits continue to be the national trend, such limitations in Missouri will likely be through legislation rather than judicial fiat.

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UPDATE: CASE LAW

MISSOURI SUPREME COURT

EVIDENCE OF OTHER CRIMES

State v. Cecil Barriner
No. 81666
Mo.banc, Dec. 27, 2000

Evidence was improperly admitted under the signature modus operandi/ corroboration exception under *State v. Bernard*. Prejudicial effect of the evidence substantially outweighed its probative value, especially since the appellant was charged with murder, not a sex crime involving inanimate objects.

EASTERN DISTRICT

DRIVING WHILE REVOKED

State v. Rowe
No. 77941
Mo.App., E.D., June 12, 2001

The defendant claimed there was insufficient evidence to show he was driving while his license was revoked, Section 302.321, RSMo 2000, because his license was revoked under the laws of Iowa rather than the laws of Missouri.

The defendant said that since he was licensed in Iowa, he had no privilege to drive in Missouri and, consequently, there was nothing for Missouri laws to revoke.

The appeals court disagreed, reasoning that the defendant was privileged under Section 302.080(2) to drive in Missouri if he had a valid license. Thus, when his Iowa license was revoked, the defendant's driving privilege in Missouri was equally revoked "under the laws of this state."

This conclusion was buttressed by Missouri's participation in the "Driver License Compact," which "exhibits the reciprocal nature among the state of the privilege to drive."

SEARCH AND SEIZURE

State v. Adams
No. 77553
Mo.App., E.D., April 24, 2001

The defendant claimed that her motion to suppress should have been sustained, arguing that the warrantless entry onto her property, the protective sweep of her house, and the subsequent seizure of evidence violated her right to be free from unreasonable search and seizure.

The court concluded that there were exigent circumstances to warrant the search and seizure. Several factors are considered in determining whether exigent circumstances exist including the gravity of the offense and whether:

- The subject is reasonably believed to be armed.
- There is a clear showing of probable cause that the suspect committed the offense.
- The subject is inside the premises to be searched.
- The suspect is likely to escape if not apprehended quickly.
- The entry is made peaceably.

To support entry onto the property, all six factors were present. The police had received statements from the pregnant victim that she had been kidnapped at gunpoint, duct taped, handcuffed and held overnight in a shed.

The victim's frantic demeanor, the sticky residue on her face, the blue dress and duct tape found outside the fence, and the corroboration of some details by a third party provided sufficient evidence to establish probable cause that the defendant had kidnapped the victim.

Also, it was likely when the first officer arrived that the defendant could have escaped or destroyed evidence while the officer obtained a search warrant. Once the kidnapping victim escaped, it was likely that the defendant would notice and flee or destroy evidence.

The "protective sweep" was similarly warranted due to exigent circumstances. A warrantless protective sweep is allowable when there are "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the swept area harbors an individual posing a danger to those on the arrest scene."

The officers had been told that another person, "Leonard," was on the premises. They also had reasonable grounds to believe that Leonard was armed because the defendant's gun was not found on the defendant.

The seizure of items discovered during the protective sweep also was justified. The protective sweep was made to look for Leonard, however, while looking, an officer saw a blue coat that matched the description of a coat said to hold the defendant's gun.

The officer reasonably patted down the clothing and felt a gun and ammunition. Having immediately recognized that the clothing contained a weapon, the officer was entitled to reach into the pockets and inspect the contents. *State v. Rushing*, 935 S.W.2d 30, 33 (Mo. banc 1996).

UPDATE: CASE LAW

WESTERN DISTRICT

HINDERING PROSECUTION

State v. Sapp
No. 58602
Mo.App., W.D., July 3, 2001

A person commits the crime of "hindering prosecution" if, "for the purpose of preventing the apprehension ... of another **for conduct constituting a crime** he prevents or obstructs, by means of deception ..., anyone from performing an act that might aid in the discovery or apprehension of such person." Section 575.030.1(4), RSMo 2000.

At issue was whether the statute applied to a situation where a woman purposely lied to police, concealing the whereabouts of a fugitive wanted for failing to appear at a probation violation hearing. The state, relying on the concurring opinion in *State v. Murphy*, 787 S.W.2d 794, 797 (Mo.App. E.D. 1990), argued that the statute **did** apply because the police were merely attempting to rearrest the fugitive for felony nonsupport for which he had been granted probation.

The appeals court, however, declined to follow the concurring opinion in *Murphy* and concluded that police were merely attempting to arrest the defendant for a possible probation violation, not "conduct constituting a crime."

The court acknowledged that the General Assembly most likely did not intend to allow individuals to hinder the arrest of fugitives wanted for violating parole or probation. However, the court held that it was bound by the plain language of the statute, which, it said, applies only to instances where the police are seeking to arrest an individual "for conduct constituting a crime," rather than parole or probation violations.

SEARCH AND SEIZURE

State v. Hayes
No. 58642
Mo.App., W.D., May 15, 2001

The old adage "he who hesitates is lost" might be applied to this case, which involves the withdrawal of a defendant's consent to search by his actions, not his words.

Police detained the defendant who was stumbling in the street, apparently intoxicated. The defendant, who denied being drunk, consented to a pat-down search by an officer who offered to drive the defendant home if he would consent to the search.

The search disclosed a crumpled cigarette package in the defendant's pocket. The officer seized and placed the package on the trunk of his patrol car, suspecting it contained narcotics. However, before he could examine the package, the defendant snatched it. The officer grabbed the defendant's arm and, after a struggle, subdued the defendant and reclaimed the cigarette package, which contained two rocks of cocaine.

The court held that this evidence was inadmissible, notwithstanding the defendant's initial consent to the search. The court found that the defendant's action in grabbing the package constituted a "withdrawal of consent," and was no different than if the defendant had said, "I withdraw my consent to search" or "Give me back my cigarette pack."

The court reasoned that since a defendant's denial or withdrawal of consent cannot be used to support a finding of "reasonable suspicion," a defendant's actions that could be construed as a withdrawal of consent also cannot be used as a factor supporting reasonable suspicion.

Note: Presumably, the result would have been the same if the defendant had taken a handgun and began firing to keep officers from examining the package. A motion to transfer is pending.

State v. Bordner
No. 58829
Mo.App., W.D., June 26, 2001

The defendant challenged the existence of "probable cause" to support a search warrant of his home that uncovered drug paraphernalia and more than 2,000 grams of meth.

In the fall of 1998, Lee's Summit police received two anonymous reports that the defendant was making meth at his home and that he was armed with a pistol and several assault weapons. In May 1999, police conducted a "trash pull" in front of his home that found numerous items used in meth production. A check of the appellant's background indicated several arrests for assault and a statement by the defendant that he was not afraid of the police and that if they entered his home "they would not be leaving."

The defendant argued on appeal that this evidence did not establish probable cause to support the issuance of the warrant since no one saw him place the trash in front of his house, nor was there evidence that any items in the trash contained the defendant's name or street address.

However, the appeals court held that the contents of the trash bags corroborated earlier reports of meth making, and that trash placed in front of his house on trash pickup day supported the reasonable inference that the defendant had placed them there.

The court declined to follow an Illinois appellate decision that, under similar circumstances, had concluded that such information was insufficient to support a finding of probable cause.

UPDATE: CASE LAW

WESTERN DISTRICT

SEARCH AND SEIZURE

State v. Sullivan
No. 58537
Mo.App., W.D., July 17, 2001

Detectives assigned to the Jackson County Drug Task Force were conducting surveillance on a house in Raytown, waiting to serve a search warrant, when Brandon McCombs, the target of the search, his cousin, and defendant Somer Sullivan left in Sullivan's vehicle.

The warrant had been issued based on McCombs' prior sale of narcotics to an undercover officer and an earlier "trash pull" at McCombs' residence.

Sullivan first challenged the stop of her vehicle, arguing that the police did not have a "reasonable suspicion" that she was engaged in unlawful drug activity at the time of the stop. The appeals court agreed, finding that while the police suspected McCombs or one of the other occupants of the vehicle might be transporting drugs, this was a hunch, unsupported by any articulable facts.

The court also held that the stop was not justified by *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), which holds that police armed with a search warrant looking for contraband may briefly detain the occupants of the searched premises while conducting the search. The court held that this case did not apply since McCombs already had left the residence before the search and was not even aware of a warrant.

But the court went on to hold that the stop was authorized because police had probable cause to arrest McCombs for a prior narcotics violation, although the stopping officer did not use this as his basis. The court held that since there existed an objective basis for arresting McCombs that was known to the arresting officer, his subjective belief that he lacked probable cause was not determinative.

The appeals court also rejected the defendant's contention that her consent to search her car, which police obtained immediately after the stop, was the product of her unlawful detention and in violation of the *Miranda* decision.

The court found that the detention was no longer than needed to effectuate McCombs' arrest, and that the police did not need to advise the defendant of her *Miranda* rights prior to requesting consent to search.

INSTRUCTIONS

State v. Paul Hahn
No. 57654
Mo. App., W.D., Dec. 19, 2000

In this prosecution for second-degree murder and armed criminal action, the trial court did not err in refusing an instruction on voluntary manslaughter.

The defendant's actions did not result from the influence of sudden passion because the law requires that the offense must have been committed in sudden passion, and not after there had been a time for passion to cool.

Because a cooling-off period had already transpired from any prior hostilities between the defendant and the victim, and because those hostilities themselves could not amount to adequate cause, there was no error.

SOUTHERN DISTRICT

SEARCH AND SEIZURE

State v. Middleton
No. 43 S.W.3d 881
Mo.App., S.D., 2001

The defendant was stopped by a deputy sheriff for speeding. While writing the ticket, the deputy noticed the defendant appeared to be "real nervous."

He asked the defendant if he had any weapons or drugs in his vehicle or on himself. The defendant said "no." The deputy asked, " Do you care if I search?" The defendant said, "Yeah, you can search."

The deputy, who asked the defendant to get out of his car, conducted a pat-down weapons search. He detected a large bottle in the defendant's pocket. When asked about it, the defendant said it contained Tylenol. With his hands on the outside of the defendant's pants, the deputy shook the bottle, but felt nothing rattling. He asked the defendant if he "would take it out of his pocket."

The defendant agreed, reached into his pocket, but did not take out the bottle. The deputy asked if he could reach into the pocket and get the bottle and the defendant replied "yes." The deputy took out the bottle and then opened it after getting permission from the defendant. The officer found three bags of LSD.

The appeals court found that the drug seizure resulted from a valid consensual search. The consent was freely and voluntarily given.

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HIGH TECH: CONTINUED FROM PAGE 1

enforcement personnel to the challenges presented by the increased use of computers and the Internet to commit and store evidence of crime. The programs also address Fourth Amendment and other legal issues arising out of this developing area of law enforcement.

Youngs and high tech unit investigators David Finch and Chris Pickering conduct the training, which includes several hands-on exercises.

All of the classes have been full, which was expected, Youngs said. "What has been a little surprising is the number of cases officers from all over the state have already encountered that have a computer or some other high-tech aspect to them.

"Almost all of the attendees indicated they have handled at least one case that involved computers or the Internet, which shows this is an area of law enforcement all agencies need to be trained to address," he said.

Youngs and Finch also gave two four-hour, POST-certified presentations during MDSA's 14th annual Training Seminar and Convention.

The unit is available to provide POST-certified training to individual departments and agencies, and is working with the U.S. Attorney for the Eastern District to conduct a statewide computer crimes training program in St. Louis in the spring of 2002.

THREE OFFICERS from the St. Charles County Sheriff's Department attended a regional training program in Jefferson City. Pictured with Attorney General Jay Nixon, left, are from left: Detective Bryon Hendrix, Detective Sgt. Chris Mateja and Detective Jim Woerther.